

The G20 Summit's Virtual Mob: Are Courts Prepared for a New Age of Protests?

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<https://www.e-ir.info/2017/08/17/the-g20-summits-virtual-mob-are-courts-prepared-for-a-new-age-of-protests/>

ALEXANDER HEINZE, AUG 17 2017

In the 15th century, the German city of Hamburg became the venue of a class fight that made history. On one side, there was the upper class of the city. On the other side, there was Germany's most famous pirate Klaus Störtebeker, the Robin Hood among the pirates, who took from the rich and gave to the poor. Over 600 years later, Hamburg witnessed a similar fight – but this time, swords and hooks were replaced by smartphones and tablets, resulting in the most violent protests the people of Hamburg have experienced for a long time. The mob turned parts of the city into a battlefield and reflected badly on crowds in general, which were now perceived as evil masses that turned individuals into a looting, self-indulgent crowd. Social media exacerbated these effects, because it dramatically changed the way demonstrations and protests are organized and conducted. Through social media, everyone can join the crowd both geographically and virtually, turning the internet into the virtual version of physical assembly. The dangers this creates are neither abstract nor far-fetched: We know today that the London riots 2011 were planned and coordinated through the so-called BlackBerry Messenger (BBM). In England (and Wales), the enactment of the Serious Crime Act 2007 proved to be effective in addressing encouragement to riots through social media, especially where the encouragement was directed at a potentially limitless number of people in a single step. The Court of Appeals noted in the Blackshaw case, where the defendants set up a Facebook event to encourage rioting, that 'modern technology almost certainly assisted rioters in other places to organise the rapid movement and congregation of disorderly groups in new and unpoliced areas'.

In the United States, most of the state laws criminalizing incitement to riot are influenced by two Supreme Court cases: *Schenck* with its 'clear and present danger' test (likelihood of imminent, significant harm [shouting fire in a crowded theater]), and *Brandenburg*, introducing the 'imminent lawless action' (a likelihood to produce illegal action and an intent to cause imminent illegality). Both tests are a too high threshold to actually punish incitement to riot through social media. When protesters in Fayetteville interrupted a speech of then-presidential candidate Trump, he called on security officers to 'get 'em out', praising the 'good old days', where 'this doesn't happen because they used to treat [protesters] very, very rough', which resulted in several members of the audience assaulting the protesters. Since North Carolina's incitement to riot law relies on the clear and present danger test (conduct that 'creates a clear and present danger of injury or damage to persons or property'), investigations against Trump were soon discontinued due to a lack of evidence.

The recent protests in Hamburg during the G20-summit were also incited through speech acts, but in Germany actions like those of Trump would probably result in a prosecution. In fact, Germany already had its Trump moment: The German Federal Court of Justice in 1984 held the planner and organizer responsible for rioting as a perpetrator. The accused in that case was Alexander Schubart, then a civil servant in the legal department of the administration of Frankfurt, who spoke to protesters during a campaign and told them to block the airport on the following day. As a result, several thousand protesters gathered in front of Frankfurt Airport the following day, which resulted in violent clashes with the police. Schubart himself was never present during the riot, however somehow expected the protests to turn violent. A constitutional complaint against the judgment was unsuccessful. Thus, the German law does not find a constitutional right violation in holding organizers and planners of violent protests responsible, regardless of their physical presence.

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This could not happen in the United States, despite the fact that a strong encouraging figure or mastermind is a most vital component in the commission of rioting. Social media are a crucial tool to that end, because they keep the in-person audience's size at a maximum. And here, size actually matters: the bigger the audience, the greater the chance at least one audience member will respond with violence to speech that is offensive or advocates violence. In general terms, modern communication methods allow the crowd to include a larger body of the community than standard face-to-face interactions permit. This should be reason enough to reconsider the application of the Brandenburg test: the bigger the audience size, the greater the possible damage a crowd might cause. The imminence test fails to take into account the peculiarities of speech through social media, which reaches far more people than speech outside the virtual world, but might also go unheard.

UK and German laws are better suited for the challenges virtual crowds pose. This, however, is not necessarily a good thing. Especially in the face of increasing crowd violence using social media, there is a latent danger of throwing the baby out with the bathwater. In the English Blackshaw case, all ten appellants pleaded guilty! Given the enormous media coverage of the London riots, the polarized media commentary demanding from Courts to 'send a message', the fact that the judiciary increased the penalties imposed on rioters, and the abandonment of sentencing guidelines, the sheer pressure on the criminal justice system to reach charges and convictions is obvious, as is the inherent danger for false confessions. US state laws have the advantage of treating crowd members as individuals rather than parts of a crowd. Jumping on the bandwagon of demonizing crowds – as German newspapers currently do – does not quite get to the point of violent protests and their causes. Harper Lee's observation of crowd behavior in 'To kill a mockingbird' is therefore more topical than ever: 'A mob's always made up of people, no matter what. Mr. Cunningham was part of a mob last night, but he was still a man. Every mob in every little Southern town is always made up of people you know – doesn't say much for them, does it?'

About the author:

Alexander Heinze is an Assistant Professor of law at the University of Göttingen. He is an elected member of the International Law Association Committee on Complementarity in International Criminal Law, book review editor of the Criminal Law Forum and has been working for the Appeals Chamber of the International Criminal Court as a visiting professional. His research and publications (in English, Spanish and German) deal with various aspects of comparative law, international criminal procedure, legal theory, philosophy, the sociology of law and media law.